No. 20760

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a CARMICHAEL FLOOR COVERING CO.

and

JOHN DUNCAN, An Individual, d/b/a DUNCAN FLOOR CO., RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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No. 20,760

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING CO.

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JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR CO., RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondents on November 9, 1965, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73

Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[1] The Board's decision and order (R. 38-39)[2] are reported at 155 NLRB No. 65. This Court has jurisdiction, the unfair labor practices having occurred in Sacramento, California. No jurisdictional issue is presented (R. 9; Tr. 10-11). The charges against the two respondents were consolidated by the Board for hearing (R. 3-7).

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondents refused to bargain with the Union,[3] in violation of Section 8 (a)(5) and (1) of the Act, by refusing to acknowledge that they were bound by a collective bargaining agreement executed on their behalf and by contracting out their floor covering installation operations without first bargaining with the Union.

A. *The Bargaining History*

Prior to April 8, 1964, both respondents were members of the Sacramento Valley Floor Covering

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[1] The relevant statutory provisions are reproduced in Appendix A, *infra*, pp. 22-29.

[2] References designated "R." are to Volume I of the record, reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the transcript of testimony, reproduced in Volume II of the record. References designated "G. C. Ex." and "R. Ex." are to exhibits of the General Counsel and respondents, respectively. Those references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Carpet, Linoleum and Soft Tile Local Union No. 1237, Brotherhood of Painters, Decorators, and Paperhangers of America, AFL-CIO.

Association (hereafter "the Association"). Since 1954, the Association had represented, for purposes of collective bargaining with the Union, various employers engaged in the sale and installation of floor covering material (R. 22-23; 9-10). The members of the Association, and sometimes other employers, authorized the Association to negotiate and execute a series of contracts with the Union covering their installation employees. These agreements were negotiated and signed by the Association on behalf of those employers whom it was authorized to represent (R. 23; Tr. 15, G.C. Exh. 2, 7, 17).

Respondent Johnson, doing business as Carmichael Floor Covering Company (hereafter "Carmichael"), had been a member of the Association since its inception (R. 23; Tr. 151-152). On January 2, 1963, Carmichael signed an authorization under which the Association was authorized to represent Carmichael in collective bargaining with the Union (R. 23; Tr. 153, R. Ex. 3). Carmichael never formally revoked the authorization, which by its own terms remained effective unless revoked by a 30-day written notice (R. 23; Tr. 161, 167-168, R. Ex. 3).

Duncan Floor Company (hereafter "Duncan") became a dues-paying member of the Association in August 1963 (R. 23; Tr. 101-102, 108). However, on May 11, 1962, Duncan had signed an authorization empowering the Association "to negotiate, execute and enter into collective bargaining agreements" with the Union. The authorization was to remain in effect until the end of the calendar year 1962 (G.C. Exh. 24). In a letter to the Union dated May 16,

1962, the Association listed Duncan as one of the employers whom it was authorized to represent in contract negotiations (G.C. Exh. 3).

On June 1, 1962, the Association and the Union executed a collective bargaining agreement, which was automatically renewable from year to year unless either party gave timely written notice of its intention to alter or terminate the agreement (G.C. Exh. 2). Both Duncan and Carmichael considered themselves bound by the agreement and both complied with its terms (R. 23; Tr. 18, 116-117, 169-170).

B. *The 1963-1964 Negotiations*

In March 1963, the Union gave notice that it desired to open the agreement (R. 24; G.C. Exh. 4). On May 20, 1963, the Association forwarded to the Union a list of the employers whom it represented, including both Duncan and Carmichael (R. 24; G.C. Exh. 5). A similar list forwarded on June 3, 1963, also contained the names of both Duncan and Carmichael (G.C. Exh. 6). Negotiations between the Association and the Union resulted in an interim agreement, which was executed on June 6, 1963 (R. 24; Tr. 20, G.C. Exh. 7). The interim agreement provided for certain wage increases and extended all other terms of the previous contract until such time as the Union presented for signature its locally prevailing standard collective bargaining agreement (G.C. Exh. 7). Both Duncan and Carmichael considered themselves bound by the interim agreement (R. 24; Tr. 134-135, 169-170).

Among the contract terms that were extended by the interim agreement were certain restrictions on subcontracting (R. 25; G.C. Ex. 2). The Association filed charges with the Board alleging that the subcontracting provisions violated Section 8(e) of the Act.[4] The parties reached a settlement agreement, approved by the Board, under which the Union agreed not to give effect to these subcontracting restrictions. (R. 24-25; Tr. 92, 171-172, G.C. Ex. 25). The parties then agreed upon the following new provision on subcontracting, which was contained in the complete collective bargaining agreement presented to the Association by the Union in late September 1963 (R. 25; Tr. 34-35, 91-92, G.C. Ex. 17):

> Employer agrees to refrain from contracting out unit work now being performed by his employees covered by this contract.

The Association did not immediately sign the complete contract, as it had agreed to do in the interim agreement (R. 25; Tr. 71). The Union was advised by its counsel that a signed agreement was necessary to make the fringe-benefits provisions binding on the employers (R. 25; Tr. 85). Thereupon, the Union approached many of the employers individually and obtained their signatures on contracts identical to one presented to the Association (R. 25; Tr. 85-86, G.C. Ex. 8, 9, 17). Duncan and Carmichael both signed individual agreements (R. 25; Tr. 23-26, G.C. Ex. 8, 9).

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[4] Reproduced at p. 26, *infra*.

On October 2, 1963, the Union was notified in a letter signed by both Carmichael and the Association that Carmichael had authorized the Association "to execute all documents and contracts pertaining to matters of collective bargaining." The letter also declared that all contracts or other documents signed by Carmichael individually were null and void and that Carmichael was "bound by the provisions of all agreements, addendums and commitments" made for and on its behalf by the Association (R. 25; Tr. 26-27, G.C. Ex. 10). On October 16, 1963, the Association sent the Union a letter listing the employers, including both Duncan and Carmichael, whom it represented "under power of attorney." The letter declared that the Association had exclusive authority to execute collective bargaining agreements for the listed employers and that all agreements signed individually by the employers were null and void. The letter also noted that copies had been sent to the members of the Association (R. 25-26; G.C. Ex. 12).

On January 16, 1964, the Association advised the Union that Carmichael had changed its status as an employer and would contract out all work and service covered by the collective bargaining agreement (R. 26; Tr. 29-30, G.C. Ex. 14). The Union immediately protested to the Association that the contracting out would be contrary to its agreement not to contract out unit work (R. 26; Tr. 30, 58-61). Carmichael, after being informed by a representative of the Association that he had to negotiate with the Union before contracting out, abandoned its subcon-

tracting plans and continued to use its own employees for installation work (R. 26; Tr. 30, 170-171).

By early April 1964, the complete agreement had still not been signed by the Association. On April 6, the Union advised the Association that unless it signed the locally prevailing agreement by midnight, April 10, the employers listed as signatory members of the Association would not have employees supplied under the terms of the agreement (R. 26; Tr. 32-33, G.C. Exh. 16).[5] The Association signed the agreement and submitted it to the Union on April 8, 1964. Nothing was mentioned concerning the authority of the Association to represent Duncan or Carmichael (R. 27; Tr. 34-35). The agreement finally executed was the same one submitted to the Association in September (R. 26; Tr. 33-35, G.C. Exh. 17).

C. *Respondents contract out their installation work without bargaining with the Union*

On April 9, the day after the execution of the agreement, the Association stated in a letter to the Union that Duncan and Carmichael had "discontinued their operations as employing contractors and will not be party to the Master Agreement, as all installation will be done by labor contractors parties to the agreement" (R. 26; Tr. 35-36). Carmichael and Duncan terminated their installation employees on April 10 (R. 27; Tr. 66, 126-128, 160-163). At no

[5] In Section 2 of the agreement, the Union agreed to furnish as many competent workmen as needed by members of the Association. The employers, however, retained "entire freedom of selectivity in hiring" (G.C. Exh. 17).

time prior to the termination of the employees did either Duncan or Carmichael, or the Association acting on their behalf, undertake to bargain with the Union concerning the decision to contract out installation work (R. 27).

After April 10, Carmichael and Duncan continued in business as before, except that each relied on the employees of other contractors to do installation work (R. 27; Tr. 112-113, 158-162). Duncan continued to make bids and contracts with his customers for a total price, including both material and installation costs (Tr. 112-113). After being terminated on April 10, two of Carmichael's three regular employees did not have steady work, and the third employee dropped out of the Union and went to work for an employer not covered by the agreement with the Union (Tr. 43-44). Of Duncan's five regular carpet layers, four had little work after April 10 (Tr. 45-47). Carmichael subcontracted all linoleum installation work to a contractor not covered by the union agreement (Tr. 43-44, 162-164). Duncan relied on a single subcontractor for all installation work, and none of Duncan's employees became employees of the subcontractor (Tr. 67, 77-78).

II. The Board's Conclusions and Order

The Board affirmed the Trial Examiner's finding that both Duncan and Carmichael had authorized the Association to negotiate and execute agreements with the Union on their behalf during the 1963-1964 negotiations (R. 23-24; Tr. 38-39). The Board also agreed with the Trial Examiner that neither Duncan nor

Carmichael had made a timely withdrawal from the multi-employer bargaining unit and that both were bound by the agreement signed by the Association on April 8, 1964 (R. 28). Accordingly, the Board found that both respondents had violated Section 8(a)(5) and (1) of the Act by refusing to acknowledge that they were bound by the agreement signed on their behalf and by contracting out their installation work without bargaining with the Union (R. 28-29).

The Board ordered respondents to cease and desist from the unfair labor practices found and to bargain with the Union by acknowledging the binding effect of the agreement signed on April 8, 1964. The Board also ordered respondents to resume the installation operations which they had unlawfully discontinued and to reinstate with payment of lost wages those employees who had been terminated on April 10, 1964 (R. 33-34).

SPECIFICATION OF POINTS RELIED UPON

1. Substantial evidence on the record considered as a whole supports the Board's finding that respondents violated Section 8(a)(5) and (1) of the Act by refusing to acknowledge that they were bound by the agreement signed on April 8, 1964.

2. Substantial evidence on the record considered as a whole supports the Board's finding that respondents violated Section 8(a)(5) and (1) of the Act by unilaterally contracting out their installation work without notifying or consulting with the Union.

3. The Board's order is valid and proper.

ARGUMENT

I. Substantial Evidence On The Record Considered As A Whole Supports The Board's Finding That Respondents Violated Section 8(a)(5) And (1) Of The Act By Refusing To Acknowledge That They Were Bound By The Agreement Signed On April 8, 1964

As the Statement shows, prior to April 8, 1964, the Association had negotiated and executed collective bargaining agreements with the Union on behalf of both respondents. Then, more than 10 months after negotiations had begun for a new contract, respondents attempted to withdraw from the multi-employer bargaining unit, repudiated the contract which had been negotiated by the Association and the Union, and immediately disregarded the agreed-upon prohibition against the contracting out of work. We show below that respondents' attempts to withdraw from the multi-employer unit were not effective and that their refusals to accept the multi-employer agreement constituted refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

A. *Introduction and Controlling Principles*

The value of multi-employer bargaining to the development of stable and responsible industrial relations has been widely recognized.[6] Negotiations on such a basis have been a "vital factor in the effectua-

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[6] See, e.g., *N.L.R.B.* v. *Truck Drivers Local 449, Teamsters (Buffalo Linen)*, 353 U.S. 87, 95; Report of General Subcommittee on Labor, House Committee of Education and Labor, 88th Cong. 2d Sess., "Multiemployer Association Bargaining and its Impact on the Collective Bargaining Process" (Comm. Print'g 1965).

tion of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen, supra*, 353 U.S. at 95. The central feature of such bargaining, through which the desired stability of collective bargaining is achieved, is the standardization of contract terms for the employers within the bargaining unit. Clearly, such standardization could not be achieved if an individual employer, having manifested an intent to be bound by group bargaining, could refuse to be bound by the results of that bargaining (*New York Mailers' Union Number Six, ITU, AFL-CIO* v. *N.L.R.B.*, 327 F. 2d 292, 297-298 (C.A. 2)), and could thereby withdraw from the multi-employer group simply because he disagreed with specific proposals made by it as his representative or disagreed generally with the course of the negotiations. In short, multi-employer bargaining can only be meaningful where the employer members of the unit, like the union, are bound by the agreement concluded on their behalf by their representative. Thus, an employer violates its statutory bargaining obligation when it refuses to be bound by an agreement reached by its authorized multi-employer bargaining representative. *N.L.R.B.* v. *Jeffries Banknote Co.*, 281 F. 2d 893, 896 (C.A. 9), enforcing 124 NLRB 920; *Universal Insulation Corp.* v. *N.L.R.B.*, 62 LRRM 2223 (C.A. 6, May 20, 1966); *Cooke & Jones, Inc.*, 146 NLRB 1664, 1673-1674, enforced, 339 F. 2d 580 (C.A. 1); *Ice Cream, Frozen Custard Employees, Local 717, Teamsters (Ice Cream Council, Inc.)*, 145 NLRB 865, 871-872; *Kasco Trucking Corp.*, 133 NLRB 627, 629, 633-635; *Fairbanks Dairy*, 146 NLRB 893, 897-898, 904; *Walker Electric Co.*, 142 NLRB 1214, 1220-

1221, 1226. As we show below, the Board properly found that respondents were bound by the agreement signed on April 8, 1964.

The Board, charged with applying its "specialized judgment [to] the inevitable questions concerning multi-employer bargaining. . ." (*Buffalo Linen*, *supra*, 353 U.S. at 96), has developed certain ground rules governing the conduct of parties engaged in such bargaining. These rules, which the Board has developed in the exercise of its wide discretion in determining the unit appropriate for bargaining,[7] are designed to assure the stability which is the major objective of multi-employer bargaining, and, at the same time, to allow for certain flexibility in recognition of the consensual nature of such bargaining.[8] Experience has shown that the "labor peace" which multi-employer bargaining has fostered stems from the stability of bargaining relationships and uniformity of contract terms which are achieved by bargaining on a group basis. *Buffalo Linen*, *supra*, 353 U.S. at 94-96. A "common front [is] essential to multi-employer bargaining." *N.L.R.B.* v. *Brown, et al.*, 380 U.S. 278, 284. Thus, since the union and the employers formulate bargaining positions which they may not have adopted if bargaining were on an indi-

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[7] See, e.g., *N.L.R.B.* v. *B. H. Hadley, Inc.*, 322 F. 2d 281, 284 (C.A. 9); *N.L.R.B.* v. *Moss Amber Mfg. Co.*, 264 F. 2d 107, 110 (C.A. 9); *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 405-406 (C.A. 9), cert. denied, 348 U.S. 887.

[8] Compare *Jeffries Banknote Co.*, *supra*, with *Retail Clerks Union No. 1550* v. *N.L.R.B.*, 330 F. 2d 210 (C.A.D.C.), cert. denied, 379 U.S. 828.

vidual basis, no purpose could be served by bargaining on a group level if unrestricted withdrawal from the multi-employer unit were permitted. Therefore, the Board has held that, although participating in multi-employer bargaining is consensual in nature, withdrawal must be accomplished in an unequivocal manner, and must be made at an appropriate time. *Bell Bakeries of St. Petersburg, etc.*, 139 NLRB 1344, 1345-1346; *Evening News Association*, 154 NLRB No. 121, 60 LRRM 1149. Accordingly, once an employer has committed itself to engage in group bargaining, it is bound by the results of that bargaining unless "it clearly evinces at an appropriate time its intention of pursuing an individual course in bargaining." *N.L.R.B.* v. *Sklar, et al.*, 316 F. 2d 145, 150 (C.A. 6), and cases there cited.

B. ***Respondents' attempts to withdraw were untimely***

The Board has repeatedly found to be timely, and has recognized as valid, withdrawals made during the period between the expiration of a group contract and the initiation of negotiations for a new contract.[9] On the other hand, it has found to be untimely an employer's attempt to withdraw from a multi-employer bargaining association after he not only has participated in the negotiation for a new group contract

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[9] *Evening News Association, supra; Seattle Automotive Wholesalers Ass'n, etc.*, 140 NLRB 1393, 1396-1397; *20th Century Press*, 107 NLRB 292, 293. See also, *York Transfer & Storage Co.*, 107 NLRB 139, 140-142; *Milk and Ice Cream Dealers of Greater Cincinnati Area*, 94 NLRB 23, 24-25.

but has signed the new contract executed by the association.[10] Moreover, in the Board's view, once contract negotiations have commenced, a complete withdrawal from the multi-employer unit is untimely, and therefore ineffective, unless it is done with mutual consent or unusual circumstances are present. *The Kroger Co.*, 148 NLRB 569; *Retail Associates, Inc.*, 120 NLRB 388, 395; *Ice Cream, Frozen Custard Industry Employees, Local 717, Teamsters (Ice Cream Council, Inc.)*, 145 NLRB 865, 869-872; *Walker Electric Co.*, 142 NLRB 1214, 1220-1221; *Detroit Window Cleaners Union, Local 1391 (Daelyte Service Co.)*, 126 NLRB 63; *Spun-Jee Corp.*, 152 NLRB No. 96, 59 LRRM 1206. See also, *International Restaurant Associates*, 133 NLRB 1088, 1089-1091. Thus, once the union and the employers' representative have begun joint bargaining, having formulated and revealed their bargaining positions on a group basis, the stability of the bargaining process ordinarily requires that an individual employer not be allowed to withdraw from the unit at that juncture without the union's consent. *N.L.R.B.* v. *Jeffries Banknote Co.*, *supra*, 281 F. 2d at 896, enforcing 124 NLRB 920; *Cooke & Jones, Inc.*, 146 NLRB 1664, 1673-1674, enforced, 339 F. 2d 580 (C.A. 1); *The Kroger Co.*, *supra; Fairbanks Dairy, etc.*, 146 NLRB 893, 897-898. As the Second Circuit recently stated in

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[10] *McAnary & Welter, Inc.*, 115 NLRB 1029, 1030-1032; *Engineering Metal Products Corp.*, 92 NLRB 823, 824. See also, *Northern Nevada Chapter, National Electrical Contractors Assn*, 131 NLRB 550, 551-552; *Donaldson Sales, Inc.*, 141 NLRB 1303, 1305.

N.L.R.B. v. *Sheridan Creations, Inc.*, 357 F. 2d 245, 248:

> A shift in membership [in multi-employer bargaining] has lively possibilities for disrupting the bargaining process . . . [T]he potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun.[10a]

As shown by the statement, pp. 2-7, both Carmichael and Duncan were members of the multi-employer unit covered by the 1962 collective bargaining contract. As the negotiations for a new contract began in the spring of 1963, the Association twice informed the Union in writing that it was authorized to bargain for both Carmichael and Duncan. Both respondents considered themselves bound by the interim agreement reached in June of 1963. The interim agreement by its own terms contemplated that further negotiations leading to a full contract were to be undertaken. Both respondents knowingly permitted the Association to represent to the Union in October of 1963, not only that the Association had authority to negotiate and execute agreements on their behalf, but also that the individual contracts signed by respondents were null and void (p. 6, *supra*). At no time prior to the signing of the April 8 agreement was the Union notified that respondents intended to withdraw from group bargaining. Before the Board, respondents contended that each notified the Association of its intent to withdraw shortly before the signing of the agreement. Withdrawal at such a late state in negotiations, however, is clearly

[10a] Accord: *Universal Insulation Corp.* v. *N.L.R.B.*, 62 LRRM 2223 (C.A. 6, May 20, 1966).

untimely under the judicially approved Board standards discussed, *supra*, pp. 13-15.[11]

Immediately after attempting to withdraw from the multi-employer unit, both respondents began contracting out installation work, which was a matter upon which the Union and the Association had already bargained and reached agreement. If individual members of a multi-employer unit were permitted to withdraw in the course of negotiations and to take action without regard for agreed-upon terms, as respondents did here, the result would be to render meaningful multi-employer bargaining impossible. See discussion, *supra*, pp. 10-13. Thus, we submit, respondents must be deemed bound by the April 8 agreement and their refusals to acknowledge its binding effect constituted refusals to bargain in violation of Section 8(a)(5) and (1) of the Act. *N.L.R.B.* v. *Jeffries Banknote Co.*, and other cases cited at pp. 14-15, *supra;* see also, *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 572 (C.A. 9).

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[11] The Board noted that the Association's failure to mention Carmichael or Duncan when the agreement was signed suggested that respondents had not yet notified it of their intent to withdraw. However, the Board did not find it necessary to reach the question of whether respondents notified the Association shortly before or shortly after the agreement was signed, since the notification would not have been timely in either event (R. 27-29). Even assuming, *arguendo*, that withdrawal shortly prior to the signing of the agreement would have been timely, respondents' notices of withdrawal would not have been effective until they were communicated to the Union, which was after the signing of the agreement. *Walker Electric Co.*, 142 NLRB 1214, 1220-1221; *Detroit Window Cleaners Union, Local 1391*, 126 NLRB 63, 64-65.

II. Substantial Evidence On The Record Considered As A Whole Supports The Board's Finding That Respondents Violated Section 8(a)(5) And (1) Of The Act By Unilaterally Contracting Out Their Installation Work Without Notifying Or Consulting With The Union

The contracting out of work being performed by employees in a bargaining unit is a mandatory subject of collective bargaining under Section 8(a)(5) and 8(d) of the Act, and an employer, even though not motivated by anti-union animus, violates those provisions of the Act by contracting out without first bargaining with the union representing the employees. *Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203, 209-215; *N.L.R.B.* v. *American Manufacturing Co. of Texas*, 351 F. 2d 74, 79 (C.A. 5). Cf., *United Indus. Workers of Seafarers, etc.* v. *Board of Trustees*, 351 F. 2d 183, 190-191 (C.A. 5).

The same considerations that support the Supreme Court's decision in *Fibreboard* apply in the present case. First, as in *Fibreboard*, respondents did not alter their basic operation but relied on the employees of independent contractors instead of their own employees for installation work. Both respondents continued to be concerned with the performance of the installation work. Carmichael was interested in having its installing contractors use employees with whom Carmichael was familiar (Tr. 161-162). Carmichael also cosigned a note in order to enable one of its contractors to purchase equipment (Tr. 160). Duncan relied on one contractor for all its installation work and continued to make bids and contracts for a total price, including the cost of both material and installation (Tr. 67, 112-113). Thus, respond-

ents did not abandon responsibility for their installation work, but merely relied on the employees of independent contractors to do the same work that had formerly been done by their own employees. As in *Fibreboard*, the work was still needed by respondents and the conditions of its performance were not substantially different from those which existed before the contracting out.

Respondents' decisions to rely on installation contractors had significant impact on the terminated employees and the Union. Two of Carmichael's three regular employees did not find steady work and the third employee dropped out of the Union. Four of Duncan's five regular carpet layers had little work after April 10. An employer's statutory bargaining duty "plainly cover[s] termination of employment which . . . necessarily results from contracting out of work performed by members of the established bargaining unit." *Fibreboard, supra,* 379 U.S. at 210. Although a substantial number of the employees of the installation contractors used by respondents may have been represented by the Union, the Union had no assurance that respondents would rely on union contractors. In fact, Carmichael contracted its linoleum installations to an employer who had no agreement with the Union.

There is no merit in respondents' contention that *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, relieves an employer of any duty to bargain concerning the contracting out of work. In the first place, *Darlington* involved the closing of an entire plant, not the substitution of one group of employees

for another in a continuing operation. The Supreme Court specifically distinguished those cases where part of a business is closed "but the work is continued by independent contractors" 380 U.S. 272-273, n. 16. Moreover, the Court, in *Darlington*, was not concerned with the employer's duty to bargain under Section 8(a)(5) of the Act; the issue there was whether the employer violated Section 8(a)(3) by closing its plant for antiunion reasons.

Although the Association had been involved with the Union in Board proceedings concerning sub-contracting restrictions, and although the collective bargaining agreement contained a prohibition against contracting out, respondents did not consult or negotiate with the Union prior to reaching their decisions to contract out installation work. Respondents merely presented their decisions to the Union as accomplished facts, thus failing to satisfy even the minimal requirement of Section 8(a)(5). "An employer must at least inform the Union of its proposed actions under the circumstances which afford a reasonable opportunity for counter arguments or proposals." *N.L.R.B.* v. *Citizens Hotel Co.*, 326 F. 2d 501, 505 (C.A. 5). Accord: *Fibreboard*, 379 U.S. at 214. Therefore, we submit, respondents' unilateral decisions to contract out were refusals to bargain in violation of Section 8(a)(5) of the Act.[12]

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[12] In a concurring opinion in *Fibreboard*, Mr. Justice Stewart (speaking for himself and Justices Douglas and Harlan) indicated that collective bargaining would not be mandatory on "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise," which "are not

III. The Board's Order Is Valid And Proper

The Board's order requires respondent to reinstate their installation operations and to offer reinstatement to the employees terminated as a result of the contracting out. Respondents contend that the remedy is impractical since they have abandoned installation work, have disposed of their equipment, and do not desire to resume installation. We submit, however, that the Board's order provides a reasonable and effective remedy for the unfair labor practice and falls well within the Board's express powers.

Section 10(c) of the Act authorizes the Board, on finding an unfair labor practice, to require an employer "to take such affirmative action including reinstatement of employees with * * * backpay, as will effectuate the policies of the Act." As the Supreme Court has pointed out, the design of remedies is "committed to the Board, subject to limited judicial review." *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194. See also, *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344; *N.L.R.B.* v. *Gullett Gin Co.*, 340 U.S. 361, 362-363; *International Association of Ma-*

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in themselves primarily about conditions of employment" and which "lie at the core of entrepreneurial control." (*Id.* at 223.) The majority of the Court drew no such a distinction. In any event, respondents did not contend before the Board that their decisions to contract were essentially matters of capital investment or liquidation. The record is clear that both respondents were primarily interested in delegating their installation operations and relieving themselves of their installing employees (Tr. 136-137, 157-158). Any sale of tools or machinery was merely incidental to the contracting out of the installation work itself. See, *N.L.R.B.* v. *Northwestern Publishing Co.*, 343 F. 2d 521, 526 (C.A. 7).

chinists v. *N.L.R.B.*, 311 U.S. 72, 82; *Virginia Electric and Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 540. Typically, as here, the remedial order issued by the Board is designed to remove the effects of the unfair labor practice by effecting "a restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]." *Phelps-Dodge*, *supra*, 313 U.S. at 194. The Board's order should stand if it is reasonably "adapted to the situation which calls for redress." *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. In *Fibreboard*, the Supreme Court enforced the Board's order requiring the Company to resume the operation it had contracted out for lawful economic reasons and to reinstate the employees with backpay. Substantially identical orders have been enforced where such action was motivated by antiunion considerations. See for example, *N.L.R.B.* v. *Bank of America*, 130 F. 2d 624, 628-629 (C.A. 9), cert. denied, 318 U.S. 791, enforcing in this respect, 26 NLRB 198, 210-213; *Butler Brothers* v. *N.L.R.B.*, 134 F. 2d 981, 985 (C.A. 7), cert. denied, 320 U.S. 789, enforcing 41 NLRB 843, 868-870; *N.L.R.B.* v. *Preston Feed Corp.*, 309 F. 2d 346, 352 (C.A. 4); *Town & Country Mfg. Co.* v. *N.L.R.B.*, 316 F. 2d 846, 847 (C.A. 5); *N.L.R.B.* v. *Brown-Dunkin Co.*, 287 F. 2d 17 (C.A. 10), enforcing 125 NLRB 1379, 1386, 1389; *N.L.R.B.* v. *Kelly & Picerne*, 298 F. 2d 895, 899 (C.A. 1); *N.L.R.B.* v. *Cape County Milling Co.*, 140 F. 2d 543, 546 (C.A. 8).

The Board's order in the present case places no unreasonable burden on respondents. It does not re-

quire respondents to maintain installation operations indefinitely. After they have satisfied their bargaining obligation, respondents will be free to contract the work out, if they still desire to do so. Nor does the order require respondents to purchase new equipment on a permanent basis. They could, for example, rent or lease equipment temporarily while bargaining with the Union. As discussed, *supra*, pp. 17-18, respondents have not altered the basic nature of their operations but have merely relied on independent contractors for installation work. They continue to sell the same products and there is no indication of any change in the types of customers they serve.

CONCLUSION

For the reasons stated above, we respectively submit that a decree should issue enforcing the Board's order in full.

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May 1966

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *

(d) For the purpose of this section, to bargain collectively is the performance of the obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith

with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewithin notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a pe-

riod of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided, further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(e) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or

agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary cir-

cumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification in section 1254 of title 28.

APPENDIX B

The following table of exhibits referred to in the Board's brief is presented pursuant to Rule 18(f) of the Rules of the Court. References are to the typewritten transcript of record ("Tr."):

GENERAL COUNSEL'S EXHIBITS

Number	Identified	Offered	Received in Evidence
2	16	16	16
4	19	19	19
5	21	21	21
6	22	22	22
7	22	22	22
8	25	25	25
9	26	26	26
10	27	27	27
12	28	28	28
14	30	30	30
16	33	33	33
17	34	34	34
24	129	129	129
25	133	133	133

RESPONDENT'S EXHIBIT

3	155	155	155

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